

Supreme Court U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. **78-1480**

PETER S. DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

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March 26, 1979

TABLE OF CONTENTS

| | <u>Page</u> |
|---------------------------------------------------------------|-------------|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 3 |
| Statutes and Regulations Involved | 6 |
| Statement of the Case and Reasons for Granting the Writ | 6 |
| Conclusion | 9 |

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Petitioner Peter S. Davis asks
that a writ of certiorari issue to
review the judgment of the Court of
Appeals for the Second Circuit, entered
on September 14, 1978, as corrected by

order dated February 14, 1979.*

OPINIONS BELOW

The majority opinion of the Court of Appeals (Feinberg and Timbers, JJ.), as corrected, and the concurring opinion of the Court of Appeals (Mansfield, J.), are not yet officially reported. They appear as Appendix C to this petition. The opinion of the United States District Court for the Southern District of New York (Haight, J.), not officially reported, appears as Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on September 14, 1978. A timely petition for rehearing with

*The defendants below were Peter S. Davis, Douglas P. Fields, Frederick M. Friedman, Alan E. Sandberg, and Eric Berge. Fields and Sandberg, and Friedman are filing separate petitions.

suggestion for rehearing en banc was filed October 16, 1978. On February 14, 1979, the Court of Appeals amended its original opinion and denied in all other respects the petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does a federal district court have the supervisory power to dismiss an indictment when it makes the unchallenged findings:

a. that there has been deliberate, deceitful and duplicitous government misconduct;

b. that the misconduct has caused severe and devastating prejudice to an individual; and

c. that dismissal of the indictment is the only effective

sanction for the misconduct?

Petitioner submits the answer is "yes" and that the Second Circuit's holding to the contrary conflicts with the First Circuit's decision in Rodman v. United States, 519 F.2d 1058 (1st Cir. 1975).

2. Does the Northway* definition of "materiality" mean that a corporate officer must disclose a financially immaterial transaction in SEC filings because that transaction "may well" have violated the law -- when that transaction was never adjudged to violate the law, when no litigation had ever been commenced alleging that it violated the law, and when he contends that it does not violate the law?

*TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976).

Petitioner submits that the answer is "no" and that the Second Circuit's misreading of Northway creates bad new law and conflicts with decisions in the Third and Eighth Circuits.

3. May the SEC staff routinely disregard statutes and regulations that indisputably require full Commission approval for criminal references, on the excuse that delivery of the SEC file to a prosecutor -- and even calls to the prosecutor urging that the SEC "really want[s] to get" the defendants -- do not constitute a "criminal reference" but are merely "preliminary communications?"

Petitioner submits that the answer is "no" and that the Second Circuit's adoption of the SEC's semantic distinction is erroneous and contrary

to a stipulation in the trial court.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Code of Federal Regulations are set out in the statutory addendum ("Add.") annexed to the petition for certiorari of defendants Fields and Sandberg (the "Fields petition") which is being filed contemporaneously.

STATEMENT OF THE CASE AND
REASONS FOR GRANTING THE WRIT

The Fields petition raises the same questions for review as those presented here and fully discusses the applicable law and facts. Those arguments will not be repeated and petitioner Davis adopts and incorporates them by reference. However, there are

certain matters pertaining solely to petitioner Davis on the first question we present for review.

Specifically the SEC's pervasive and egregious misconduct harmed Davis much more severely than the other defendants. Like the other defendants, Davis was deceived by the SEC into contributing to a substantial monetary settlement as the price of avoiding a criminal prosecution. In addition, the SEC's misconduct destroyed Davis professionally. Petitioner Davis was a well-regarded securities lawyer and general counsel to TDA Industries. As the District Court found, the SEC deliberately deceived Davis into consenting

"to the most severe administrative sanction available to the SEC, a lifetime

resignation from practice before the SEC, as a result of which Davis was forced to resign from the law firm he had built up, which specialized in SEC practice, and was forced to give up the practice of law." (A.23).

As the District Court found, there was no adequate sanction save for dismissal to remedy the harm that Davis suffered because of the SEC's misconduct. In holding that a District Court is powerless to deal effectively with misconduct of the magnitude found to have occurred here, the Court of Appeals' decision raises important questions regarding judicial control of administrative wrongdoing as it directly affects the criminal justice process warranting review by this Court. Moreover, it is plainly at odds with the First Circuit's opinion in Rodman v. United States, 519 F.2d 1058 (1st Cir.

1975), where the supervisory power was invoked to dismiss an indictment in far less egregious circumstances than exist here.

CONCLUSION

For these reasons, and the reasons set forth in the Fields petition, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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